No. 82-111

In The

Supreme Court of the United States

October Term, 1982

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ANTHONY PROVENZANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Where a trial judge reveals during post-conviction proceedings a longstanding and extrajudicial bias against a defendant, does not the appearance of justice standard embodied in 28 U.S.C. §455 require not only recusal from those proceedings but a new trial as well?

2. Whether testimony to be false within the contemplation of *United States v. Agurs*, 427 U.S. 97 (1976), must be literally and intentionally false or whether it is sufficient that it create a false impression on the jury?

3. Whether non-disclosed exculpatory evidence going not only to the credibility of the main government witness but to the very truth of the charges against petitioner warrant a new trial under even the most stringent of the *Agurs* tests?

4. Does not the rule of *Larrison v. United States*, 24 F. 2d 82 (7th Cir. 1928), require a new trial in federal courts where a material prosecution witness gives false or misleading testimony which is not discovered until after trial, and without which the jury might have reached a different result?

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No.

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ANTHONY PROVENZANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Anthony Provenzano prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the District of New Jersey denying petitioner a new trial and denying his application to recuse the district judge.

OPINIONS BELOW

The unreported opinion of the district court may be found in the appendix to this petition (6a).[1] The court of appeals

1. "A" references are to the appendix to this petition. References designated "a" are to the appendix submitted to the United States Court of Appeals for the Third Circuit.

affirmed by judgment order dated April 14, 1982 (3a) and on May 7, 1982 a timely application for rehearing with suggestion for rehearing *en banc* was denied (1a).

JURISDICTION

The date of judgment of the United States Court of Appeals for the Third Circuit was April 14, 1982. A timely petition for rehearing was denied on May 7, 1982. This Court's jurisdiction is invoked under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States and Title 28 U.S.C. §455 are invoked in this case. These constitutional and statutory provisions are set out in the appendix hereto (33a).

STATEMENT OF THE CASE

Petitioner, along with several others, was indicted for conspiracy and substantive violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962. After a three week trial he and his co-defendants were convicted on both counts of the indictment. Thereafter, petitioner's conviction was affirmed, *United States v. Provenzano*, 620 F. 2d 985 (3rd Cir. 1980), and this Court denied his petition for a writ of certiorari. 449 U.S. 899 (1980).

Petitioner then filed a motion for a new trial based upn newly discovered evidence (21a-32a). The matter was initially argued on May 11, 1981 (201a-288a) after which, as a result of certain remarks made by the trial judge during oral argument, petitioner moved for recusal of the judge (289a). After a subsequent

argument on June 22, 1981 (290a-323a) the motion for recusal was denied (319a-320a).

The underlying facts upon which petitioner's conviction was based need not be set out at length here. They are fully discussed in the earlier opinion of the court of appeals affirming the conviction. The facts relating to the new trial motion, which is the basis of the present appeal, fall into three separate categories, as follows:

1. The Non-disclosure of Material Relating to the FBI Florida Investigation.

Ralph Picardo was the key to the Government's case against Provenzano, one which the district judge himself described as "rather sparse" (96a). Picardo testified to only a few contacts with Provenzano concerning the subject matter of the indictment, and was generally quite vague about the dates, times and places where these meetings took place. He did, however, get specific in one instance, claiming that he met and spoke with Provenzano at the Americana Hotel in Florida in October or November of 1973 (61a-64a). In addition, there was testimony from Mary Ann Hart, one of Picardo's girlfriends, that he told her of his trip to Florida and, when he returned, displayed some new clothes that he had purchased while there (93a-94a). The defense called FBI Agent Roy Thomas Smith, Jr. as a witness for the purpose of impeaching Picardo's credibility with respect to his claimed 1973 trip to Florida and meeting there with Provenzano. The questioning of Agent Smith focused on his unsuccessful search for registration cards at the Americana covering the October-November 1973 period, based upon a February 4, 1976 report which he had filed[2] (26a) covering those activities, which was

---

2. The report actually states that the review took place on February 4, *1975* but it is conceded by all parties that that was a typographical error.

turned over to the defense in response to a request by Provenzano for so-called *Brady* material.

However, in a subsequent trial in New York,[3] in which Picardo was also a witness and in which Provenzano's trial counsel in this case was also defense counsel, he received, again pursuant to a *Brady* request, several additional items not received in this case[4] including: (1) an additional report of Agent Smith concerning his interview with one Martin Wexler and a review of records at Wexler's clothing store in the Americana Hotel on January 15, 1976 (27a); (2) a report of FBI Agent John S. Sullivan concerning his review of certain airline records on January 23, 1976 (28a).

Those reports revealed that in addition to the search for registration cards at the Americana, Smith had also interviewed the owner of a clothing store in the hotel and reviewed his records in an effort to determine whether Picardo or Provenzano had made purchases there in the relevant time period, the fall of 1973. That search was based upon information given to the Government by Picardo that he had bought clothes at the store while at the Americana and had charged the purchases to Provenzano's account. In addition, again based on information supplied by Picardo, a search was made by Agent Sullivan of airline records covering the time when Picardo made his trip. Both the clothing

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3. *United States v. Tieri*, Cr. 80-0381 (S.D.N.Y.).

4. Both of Provenzano's trial counsel submitted affidavits (55a-56a) that they had never seen or received the additional reports, while Government trial counsel submitted an affidavit suggesting that they must have received them (34a-35a). The district court did not take any evidence on the issue but simply proceeded on the assumption that the material in question had not been turned over (335a).

store and airline search provided no confirmation of Picardo's story.

2. Picardo's Perjurious Testimony.

The central attack on Picardo's credibility revolved around the benefit he sought, or hoped, to obtain from the authorities with respect to his outstanding indictment for murder in New Jersey. Convicted of second degree murder in February 1975 and sentenced to seventeen to twenty years in prison, Picardo's conviction was reversed in June 1977 and remanded for a new trial. Under cross-examination by counsel for Provenzano, Picardo testified in this trial as follows:

> "Q. Is it not a fair statement that it's your hope that you'll never have to stand trial for that murder case? A. That's correct, sir." (83a).

However, in 1980, testifying in the trial of *United States v. Tieri*, Cr. 80-0381, in the Southern District of New York, Picardo substantially and seriously changed his testimony concerning the nature of his deal with the authorities concerning a possible retrial of the murder case. Under direct examination by the Government attorney, the following testimony was elicited:

> "Q. Mr. Picardo, have you also cooperated with the State of New Jersey? A. Yes, I have.
>
> Q. In connection with that cooperation, do you have an understanding with respect to your retrial on the murder charge? A. Yes, I do.
>
> Q. What is your understanding? A. That I won't be retried again." (160a).

Again, on cross-examination by counsel for Tieri, the following colloquy took place between Picardo and the court:

> "THE COURT: Let me try to cut through this. As of April '77 you had an appeal pending your murder conviction, right?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: I think the question is at this time did you believe that if your appeal was successful and even if in terms the higher court ordered a retrial did you understand that in fact you were not going to be retried?
>
> THE WITNESS: The answer to that, sir, is yes."

Subsequently, in March 1981, testifying in the case of *United States v. Nunzio Provenzano, et als,* Cr. No. 80-315 (D.N.J.), Picardo testified as follows:

> "Q. Between June 17, 1977 and the present time, which is March 24, 1978, is your case scheduled for retrial? A. No.
>
> Q. You don't want it to be, do you? A. I have an agreement not to be.
>
> Q. You don't expect to be retried for the murder of that 19 year old boy, is that right? A. That is correct.

• • •

Q. Did you state that you had an agreement not to be retried on the murder case? A. Yes, I said that, but not by the Federal Government.

Q. With whom did you have that agreement? A. State Government.

Q. When was that agreement arrived at? A. I don't know the exact date.

Q. Would it have been several years ago? A. Yes.

Q. As long as two and a half or three years ago? A. Sir, I just said I don't know.

Q. Good enough. [192a]

* * *

Q. Mr. Goldberg amoment [sic] ago asked you a question as to an agreement you reached with the authorities of the State of New Jersey that you would not be prosecuted.

When do you say you reached that agreement? A. Sir, I don't know the exact date, and there is no way that I can determine the exact date in time.

Q. Who do you say you reached such agreement with? A. The State Attorney General's Office." (193a-194a).

3. The District Judge's Prejudice Against Provenzano.

The facts relating to this aspect of the present appeal came to light during the initial argument of the new trial motion on May 11th, when the court made the following remarks:

> "THE COURT: If I grant a hearing in this case and you and Mr. Edelbaum have all the hay you want and take up another week or ten days and then you lose, what's the next lawyer going to do for Tony Provenzano to get a hearing next year or the year after? Because if you've got anything in the background I want to know it now so I can get it all over at once.
>
> I don't want him to ruin my judicial career like he did Judge Shaw's." (261a).

Later, the court made the following revelation:

> "THE COURT: I sat on the Ethics Committee in Hudson County which involved a lawyer who was a witness in the Provenzano case before Judge Shaw, Judge, late Judge Shaw, named Michael Comenalli. I was on the Ethics Committee for years. And we had a complaint about Mr. Comenalli, he had testified, apparently, or it came up in the negotiations that he was getting money at Provenzano's behest from Dorn on a monthly retainer. Never did any service for Dorn. At the same time he was a part-time assistant in the Hudson County Prosecutor's Office.
>
> I think I got the facts straight. Year after year we sat on the Comenalli ethics complaint. Why?

> Because there was always some post-conviction matter goint [sic] on before Judge Shaw involving the 1960 or '61 conviction of Anthony Provenzano.
>
> Now is there anything more down the road, or is this it?" (273a-274a).

At the argument on the subsequent motion the court continued in this same vein, detailing at length the various judicial proceedings by Provenzano arising out of his 1963 conviction which delayed processing of the Comenalli ethics matter by the Hudson County Ethics Committee of which the district judge was a member (315a-317a).

REASONS FOR GRANTING THE WRIT

This petition raises substantial issues concerning the correct interpretation and application of this Court's decision in *United States v. Agurs*, 427 U.S. 97 (1976), in a particularly clear and compelling factual context. The case also raises the issue, never before addressed by this Court, as to whether the so-called *Larrison* rule, *Larrison v. United States*, 24 F. 2d 82, 87 (7th Cir. 1928), sets forth the proper standard by which federal courts are to judge new trial motions based upon alleged perjury by a critical government witness.

In addition, going to the very heart of this Court's supervisory power, is the issue presented herein of the trial court's extrajudicial prejudice against petitioner, which asks this Court to consider, for the first time, the 1974 liberalizing amendment to the disqualification statute, 28 U.S.C. §455.

I.

Based upon comments made by the trial court during argument on the new trial motion, evidencing a longstanding extrajudicial bias against petitioner, the trial judge should have recused himself not only from the new trial proceeding but from the original trial as well, and his participation therein requires a new trial.

At the oral argument of petitioner's new trial motion, the district judge gave vent to what was clearly a longstanding and extrajudicial prejudice against petitioner. The failure of the court of appeals to recognize this fact seriously undermines the policy of 28 U.S.C. §455, as liberalized by its 1974 amendment, and conflicts with interpretations of the statute in its own and other circuits.

There is no doubt whatsoever, from the trial court's own words, that as a result of sitting on a state ethics committee in the 1960's, he came to the conclusion that petitioner was able to perpetuate the appeals from his 1963 conviction before the late Judge Robert Shaw "beyond all tolerance" (250a-251a). Without any basis in fact, the district judge went on to express the view, obviously formed many years ago, that petitioner was responsible for ruining the "judicial career" of Judge Shaw, an occurrence which the trial judge was not going to let happen to him (261a).

Whatever may have caused the court to express these feelings in 1981 is not relevant. The only important fact is that they were expressed and represented a personal opinion formed outside the judicial arena. 18 U.S.C. §455 was amended in 1974 to render the grounds for disqualification of a trial judge broader than they had been previously under that statute or its companion, 28 U.S.C. §144. *Ritter v. United States*, 540 F. 2d 459, 462 (10th Cir. 1976).

The amended, present version of the statute was designed to substitute a "reasonable man" test for the former, subjective, "in the opinion of the judge" test, and also to overrule the so-called "duty to sit" decisions. *Davis v. Board of School Commissioners of Mobile County*, 517 F. 2d 814 (5th Cir. 1975). By adopting the "appearance of justice" standard, the statute "codally reflects our fundamental notion of a fair trial before a neutral empire." *Adams v. United States*, 302 F. 2d 307, 311 (5th Cir. 1962). As Judge Brown said there, the administration of justice requires not only that "proceedings be proper, but that they appear to be . . ." *Id.* at 310. And as the Third Circuit itself noted some years ago, the judge who presides over a trial must not only be impartial but must have the "appearance of a detached impartiality." *Rapp v. Van Dusen*, 350 F. 2d 806, 812 (3rd Cir. 1965). As Justice Frankfurter put it for this Court, "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as to be so in fact." *Public Utilities Commission v. Pollock*, 343 U.S. 451, 467 (1952).

The test under §455 is not whether an appellate court feels that the district judge is biased, but whether a reasonable "man on the street" might entertain a "reasonable doubt" as to his impartiality. *Potashnick v. Port City Construction Co.*, 609 F. 2d 1101, 1111 (5th Cir. 1980); *United States v. Cowden*, 545 F. 2d 257, 265 (1st Cir. 1976).

How can one doubt that a reasonable man, hearing the comments of the district judge on May 11, 1981, would not entertain a reasonable doubt as to his impartiality toward petitioner based upon pre-existing views which were developed long before his ascendancy to the federal bench and unconnected to the trial at which he presided? It seems inescapable that the court of appeals could only have applied an erroneous legal standard in resolving this issue, the facts being so clear. The court's comments were not only unwarranted, since it had no personal knowledge

of the events of the post-conviction proceedings arising out of the 1963 conviction, but were also without any basis in fact as to how those protracted proceedings ruined the judicial career of Judge Shaw. If the trial judge's views, as thus expressed, had been known before the trial, he certainly should not have presided. His failure to reveal that bias now requires a new trial, notwithstanding that the verdict here was returned by a jury. *United States v. Brown*, 539 F. 2d 467 (5th Cir. 1976); *United States v. Thompson*, 483 F. 2d 527 (3rd Cir. 1965); *State v. Brown*, 602 P. 2d 478 (Ariz. 1979).

This Court has not had occasion to address the issue of judicial disqualification under the 1974 amended version of §455. It should take this opportunity to make clear its adherence to the appearance of justice standard embodied therein and reflecting the deepseated and longstanding principle noted in *United States v. Brown, supra:*

> "The truth pronounced by Justinian more than a thousand years ago that 'Impartiality is the life of justice,' is just as valid today as it was then."

Public confidence in the judicial system is at stake when any criminal defendant, whether notorious or not, is convicted before and sentenced by a judge whose impartiality is placed in serious doubt. Where a court of appeals does not even deal with the issue at all, much less disposing of it in a reasoned manner, the obligation of this Court, we suggest, is even greater. Review should be granted here to insure faithful compliance with the view expressed by this Court in *In re Murchison*, 349 U.S. 133, 136 (1955):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But

> our system of law has always endeavored to prevent even the probability of unfairness . . . . To perform its high function in the best way 'justice must satisfy the appearance of justice' Offutt v. United States, 348 U.S. 11, 14, 75 S. Ct. 11, 13, 99 L. Ed. 11, 16 (1954)."

II.

The decision below seriously misapplied the rule of *United States v. Agurs*, 427 U.S. 97 (1976).

Under any of the three tests set out by this Court in *United States v. Agurs*, 427 U.S. 97 (1976), a new trial was warranted here.

The evidence in question here, which the trial court assumed had not been turned over to defense counsel, went not merely to credibility but to the very heart of the Government's case against Provenzano; to the pivotal issue of guilt or innocence. This case rested upon Picardo. If he were to be disbelieved, the Government's case unquestionably would have fallen. More importantly, this evidence, concerning his trip to Florida, was one of the few instances where Picardo became specific enough to subject himself to contradiction, as compared to other vague references to conversations or meetings with Provenzano (*compare* 61a-64a *with* 67a and 68a). The alleged visit to Florida supplied one of the few threads holding Provenzano to the fabric of the case, providing one of the crucial "links in the chain" upon which the Government and the court relied in concluding that the evidence against him was even sufficient to warrant submission of the case to the jury (96a-99a). As the summations indicated, all counsel deemed this meeting to be of the utmost significance (144a-151a).

When FBI Agent Smith was called as a defense witness at trial to testify concerning his fruitless search for registration cards

at the Americana, his answers can be seen as a calculated effort to mislead defense counsel into believing that he had *only* looked for such registration records and had done nothing else in an effort to verify Provenzano's presence at the hotel. In response to a request that he "go to the Americana Hotel and attempt to verify that these individuals had indeed stayed at the Americana at that approximate date" (111a), Smith testified that in an effort to make that determination, he went to the hotel and looked through their registration cards for the period in question (112a). Smith never mentioned anything about the search for clothing records, which was based upon information given to the Government by Picardo that he had bought clothing in the specific store and had charged the purchase to Provenzano's account (266a, 278a).

Smith's testimony as to his actions at the Americana, which the Government itself sought to impeach by suggesting that his search for registration records was not very complete (115a-116a), was at the least misleading; at best it was false. Thus, we suggest, the first tier of the *Agurs* test is implicated here: the undisclosed evidence is material if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." 427 U.S. at 103. As this Court has previously said, it is not necessary that the prosecution affirmatively solicit false evidence, it is sufficient if it allows such testimony "to go uncorrected when it appears" *Napue v. Illinois*, 306 U.S. 264, 269 (1959); *Giglio v. United States*, 405 U.S. 150, 153 (1972). Several courts of appeals have held that a requirement for false testimony does not mean that it must be literally false. It is sufficient if the evidence is intended to give the jury a false impression. *United States v. Anderson*, 574 F. 2d 1347, 1355 (5th Cir. 1978); *Campbell v. Reed*, 594 F. 2d 4 (5th Cir. 1979); *United States v. Bryant*, 439 F. 2d 642, 650 (D.C. Cir. 1941). It is for that reason that the district court's reference to the perjury statute, 18 U.S.C. §1621, and *Bronston v. United States*, 409 U.S. 352 (1972), and its conclusion that "Smith certainly testified within the letter of the truth" (335a),

were far off the mark. By affirming without opinion, the court of appeals has tacitly approved the trial court's serious misconception of the proper standard. Here, Smith's testimony clearly had the capacity to mislead the jury. This Court has never before considered whether the false testimony required to invoke the lowest of *Agurs* standards means testimony which is intentionally and literally false or whether an objective, false impression standard should be sufficient. This case presents an apt vehicle for such a determination.

Nonetheless, petitioner suggests that the evidence at issue here warranted a new trial under the second or even the third and strictest of the *Agurs* standards. Since there was a specific request here for information reflecting adversely upon Picardo's credibility, the second *Agurs* test would require that the non-disclosed evidence "might have affected the outcome of the trial." 427 U.S. at 104. For the reasons discussed above, there should be little doubt that the petitioner met this burden. Indeed, petitioner would urge that the critical nature of the Florida trip when combined with the pivotal nature of Picardo's testimony in this case, would have created a "reasonable doubt that did not otherwise exist," 427 U.S. at 112, the most stringent of the *Agurs* tests, employed where the defendant has made only a non-specific request, or none at all. The trial court's conclusion that this evidence would have been "merely repetitious and cumulative" (336a), flies in the face of the entire record, including the court's own comments during trial concerning the strength of the Government's case against Provenzano (96a). If a jury had believed that the Florida trip had not occurred, the outcome of this trial would have been quite different.

III.

False testimony by the main Government witness warrants a new trial under the *Larrison* rule.

Ralph Picardo made a career out of testifying against petitioner and his family in return for assurance that he would never go to prison, or indeed stand trial again, for his involvement in a murder which resulted in a 1975 conviction and seventeen-to-twenty-year sentence. As noted above, Picardo, when questioned about his "deal" with New Jersey authorities concerning eventual retrial on the murder charges, has repeatedly changed his testimony. Beginning with testimony in June 1978, in a New York murder prosecution of petitioner, that he was simply "awaiting trial" on the murder charges (197a-200a), Picardo testified in this case that it was his "hope" that he would never be retried (83a); in a later trial that it was his "understanding" that he would not be retried (160a, 172a-173a) and most recently that he actually had an "agreement" not to be retried (190a-191a). This understanding or agreement was, of course, at the heart of Picardo's motivation to testify and lay at the core of all defense arguments as to his bias.

If Picardo's testimony as to his mere "hope" in this case was false, a new trial would be warranted under the oft-cited rule of *Larrison v. United States*, 24 F. 2d 82, 87 (7th Cir. 1928), recognized in many circuits, *United States v. Myers*, 484 F. 2d 113, 116 (3rd Cir. 1973); *United States v. Briola*, 465 F. 2d 1018, 1022 (10th Cir. 1972); *United States v. Mackin*, 561 F. 2d 958, 961 (D.C. Cir. 1977), but criticized elsewhere. *United States v. Stofsky*, 527 F. 2d 237, 245-246 (2nd Cir. 1975); *United States v. Krasny*, 607 F. 2d 840, 846 (9th Cir. 1979), *cert. denied*, 445 U.S. 942 (1980). That rule states that where a court is reasonably well-satisfied that testimony given by a material witness is false, that without it the jury might have reached a different result and

that the defendant did not know of the falsity until after the trial, a new trial is required.

Here, Picardo's testimony was false, again in the sense that it was bound to create a false impression upon the jury. Obviously, if one has an agreement not to be retried, he must of course "hope" that he will not be retried, *i.e.*, that the agreement will be lived up to. In that sense Picardo's testimony here may have been literally true. But such an approach would rob the rule of its vitality and would permit an artful witness, as Picardo has proven himself to be, to escape the rule's sanction unscathed. If Picardo knew he had an "agreement" his response that he had a "hope" was not honest and should be countenanced. If the *Larrison* rule is the correct one in such situations it certainly should apply here. Any other result would permit a grave injustice to be perpetrated.

CONCLUSION

For the reasons set forth herein it is urged that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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